

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

**AMERICAN FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES, AFL-CIO**

Employer

and

**Case No. 5-RC-15376**

**UNITED STAFF UNION**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME or the Employer), headquartered in Washington, D.C., is engaged in the business of representing employees for purposes of collective bargaining. During the

past 12 months, a representative period, the Employer received in excess of \$50,000 from its local affiliates and individual members from locations outside Washington, D.C. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act.

United Staff Union (Union or the Petitioner) amended its Petition at the Hearing on April 12, 2002, seeking to include all full-time and regular part-time Organizers in Training, and excluding all supervisors, guards and all others specifically excluded by the Act. The Union contends that the Organizers in Training (OITs) are not temporary employees within the meaning of the Act and should be included in the existing collective bargaining unit as the OITs have a strong community of interest with the unit employees.<sup>1</sup> Alternatively the Union is willing to represent the OITs as a stand-alone unit. There are approximately 20 OITs.

The Employer asserts OITs are temporary workers, not employees within the meaning of the Act, and therefore there is no question concerning representation. The Employer further asserts that the parties have implicitly agreed through negotiations and the terms of the contract to exclude temporary organizers from the bargaining unit, and therefore the Board should dismiss the Petition.<sup>2</sup> Finally, the Employer contends that, if the Board were to determine these workers are not temporary workers, their community of interest is sufficiently different that they should be treated as a stand-alone unit and not included in the existing collective bargaining unit.

The Employer presented as witnesses Gary Frank (Frank), Assistant Director of Organizing and Field Services, and Grace Pate (Pate), Human Resources Director.

The Petitioner presented as its witnesses Prasanjit Gupta (Gupta), Organizer,<sup>3</sup> and Jacquelyn Ponton (Ponton), United Staff Union President and unit employee<sup>4</sup> of the Employer.

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<sup>1</sup> The current unit as reflected in the Pay Scale Appendix of the contract consists of over 75 job classifications, including Organizers, Journey Organizers, and Lead Organizers. The current unit additionally includes International Union Field Representatives (IUFRs), whom the Petitioner asserts are the predecessors to OITs in that IUFRs used to be the workers who were hired for "temporary" organizing assignments and formerly named Project Staff/Organizers.

<sup>2</sup> It cannot be implied from a mere unit exclusion from an agreement that there is a promise not to represent that unit. Budd Co., 154 NLRB 421 (1965). A promise not to represent a unit must be expressly made, since such a promise is a limitation on the rights of employees to free choice of representation. Women and Infants' Hospital of Rhode Island, 333 NLRB No. 65 (March 8, 2001). The Employer's argument that by the contract the Petitioner waives its right to seek to represent OITs is not supported, since the parties' contract does not contain an express promise by the Petitioner to refrain from seeking representation of the employees in question, and no evidence suggests the Petitioner expressly promised during negotiations to refrain from organizing the employees in question during the term of the contract. Lexington House, 328 NLRB 894 (1999), clarifying Cessna Aircraft Co., 123 NLRB 355 (1959); Briggs Indiana, 63 NLRB 1270 (1945).

<sup>3</sup> Gupta has been an Organizer since October 15, 2001. From November 1, 2000 to October 15, 2001, he was an OIT.

<sup>4</sup> Ponton is a labor economist in the Research Department.

Based on the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the petitioned-for employees are not temporary employees. I further find that a substantial community of interest exists between the OITs and the Organizers in the bargaining unit, and that the OITs constitute an appropriate voting group who share a community of interest with the established bargaining unit.

## **HISTORY OF COLLECTIVE BARGAINING**

The parties stipulated that there is a current contract binding between the parties, albeit awaiting the Union's signature at the time of the hearing. The current unit as reflected in the Pay Scale Appendix of that contract consists of over 75 job classifications, including Organizers, Journey Organizers, and Lead Organizers.

The bargaining unit as defined in the Union Recognition clause (Article I) of the contract is as follows:

FIELD UNIT: All employees regularly or permanently assigned or employed to non-headquarters positions, except for temporary assignments by Headquarters personnel.

HEADQUARTERS UNIT: All employees regularly employed in or assigned to AFSCME Headquarters.

It is specifically agreed that all elected AFSCME officials, [managerial and supervisory personnel], part-time, and temporary employees and employees confidential to labor management relations are expressly excluded from the recognized units. [Emphasis added].

ARTICLE XIII addresses the Employer's use of contractors, consultants, part-time and temporary employees. It states in relevant part:

**Section 13.01. Use of Nonbargaining Unit Personnel.**

AFSCME and USU recognize that under certain conditions the use of outside contractors, consultants, or part-time and/or temporary employees may be necessary and proper. In such cases, the Employer shall give the Union fifteen (15) calendar days written notice of its intent to contract out work or hire employees on a part-time and/or temporary basis. It is agreed that temporary employees shall be limited to a term of twelve (12) months, with an extension of up to three (3) months upon notice to USU.

Any person employed in such capacity shall not be re-hired during the next six (6) months as temporary.

The two previous contracts, effective in 1994 and 1999 respectively, each contained the agreement that temporary employees among others were expressly excluded from the recognized bargaining unit. Prior contracts also set limits on the employment duration of temporary employees. Formerly, the time limits were 12 months employment with a possibility of a six month extension.

During 1994 negotiations between the parties, a class of workers called "Project Staff" (who assisted with campaign-specific organizing work) was in essence split into two classes. Project Staff had previously been classified as temporary by the Employer, but at the time of the 1994 negotiations, the parties concluded some of them were not temporary, in that they continued employment for an extended period of time. The parties decided to create a class of workers called "International Union Field Representative" to be included in the bargaining unit, that would encompass the former Project Staff/Organizers who had worked for longer durations.

The shorter term Project Staff were reclassified as “Temporary Organizers,” and not included in the bargaining unit.

The Project Staff job category was eliminated by agreement, therefore, in 1994. However, Gupta testified that during his time as an OIT, he was referred to on numerous occasions as Project Staff. Project Staff and OIT referred to the same category of worker, i.e., temporary organizers hired for a period not to exceed a year to perform organizing work out in the field. The Employer offered testimony and stated in its brief that it created the Organizer in Training job title early in 2001, when it implemented a more rigorous and structured training program for the Temporary Organizers in order to build sound organizing skills, creating a labor pool of organizers for itself.

### **ISSUE 1: WHETHER OITs ARE TEMPORARY EMPLOYEES**

The Employer is an international union providing organizing services around the United States. It has salaried professional employees at both its Washington, D.C. Headquarters and in five Departments out in the Field. The Field employees work in either the Organizing and Field Services Department, or in one of the Education, Political Action, Public Affairs, and Research Departments.

The Employer hires OITs to work in its Organizing and Field Services Department, with little or no prior union organizing experience, to do a substantial part of the day-to-day work of organizing. The starting annual salary for an OIT is approximately \$30,000.

OITs are assigned to a particular campaign, and they are mentored and trained during that campaign, with both on-the-job training and classroom-type training. The standard letter of employment sent to a new OIT provides that the appointment is temporary and that there is no guarantee of continued employment. It also states that the employment period is up to 12 months, but it can be curtailed at any time<sup>5</sup> and is subject to satisfactory performance. OITs work full-time, long hours, all day and into the evening, with primary tasks of engaging in one-on-one conversations with members of the worker pool being organized, both at work sites and in homes, distributing literature, strategizing, and setting up campaigns. OITs report to an Area Organizing Director. Gupta testified that he was told by his Area Director that as long as he performed tasks Organizers had to perform and did it well, there was a very good possibility of his becoming an Organizer.

OITs are not given a definite time or date when their employment will end. While OITs are told their job is temporary and tied to the campaign to which they are assigned, they are also told their job is an on-the-job training experience, ideally 12 months in length, to develop organizing skills. Frank testified that although OITs are assigned to one campaign initially, if that campaign ends in less than 12 months and there is funding elsewhere, the OITs could be reassigned. The Employer’s objective through the OIT training is to provide the OITs with as much experience organizing as possible, which includes working on more than one campaign when feasible.

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<sup>5</sup> Funding for OIT positions are based on the budget of specific campaigns.

The Employer offers permanent Organizer positions to certain OITs who apply for permanent positions. OITs are told they may apply for Organizer positions after working as an OIT for 6 months. Between October, 2000 and April, 2002, 10 OITs became Organizers for the Employer.<sup>6</sup> Five of these 10 individuals became Organizers being employed as OITs for 8 months or less; the range of tenure of these 10 individuals ranged from less than 4 months to 12 months.

Gupta testified that there was no break in his employment from the date he ended as an OIT and the day he began as an Organizer. Furthermore, his job duties, his office desk, and his supervisor remained the same, with gradually increasing responsibilities added to his job duties as far as providing guidance to newer OITs. The date of hire listed by the Employer for the 10 OITs who became Organizers is their day of entry as OITs.<sup>7</sup>

At the time of the hearing, the Employer had 20 OITs on its staff,<sup>8</sup> all employed between October, 2000 and April, 2002. Of the 30 individuals hired as OITs between October 2000 and April 2002 who are no longer OITs, one-third of them became Organizers. The remaining 20 separated from their employment, by resignation, termination, or because a campaign ended. Periods of employment for those who separated ranged from 1 day to 16 months. Eighteen of the 20 separated in less than 9 months; 12 of those 18 separated in less than 6 months. Of these 12, 10 were resignations. In terms of percentages, over 25% of the OITs employed between October, 2000 and April, 2001 resigned, fewer than 20% were terminated, 20% continued employment as Organizers with the Employer, and the rest are still in status as OITs.

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. United States Aluminum Corp., 305 NLRB 719 (1991); Lloyd A. Fry Roofing Lithographic Co., 121 NLRB 1433 (1958); Personal Products Corp., 114 NLRB 959 (1955); NLRB v. New England Lithographic Co., 589 F.2d 29 (1<sup>st</sup> Cir. 1978). On the other hand, where employees are employed for one job only or for a set duration, or when employees are notified their jobs are temporary and have no substantial expectancy of continued employment, and there have been no recalls, such employees are excluded as temporaries. Owens-Corning Fiberglas Corp., 140 NLRB 1323 (1963); E.F. Drew & Co., 133 NLRB 155 (1961); Sealite, Inc., 125 NLRB 619 (1959); Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419 (2d Cir. 1996).

The Employer argues that OITs meet the criteria for temporary employees because: 1) OITs are hired for one job or project or for a set duration; 2) OITs have no expectancy of continued employment; and 3) OITs are each notified of the temporary nature of their jobs.

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<sup>6</sup> During this same time period, 19 Organizers were hired from “outside” (i.e., not through the OIT program).

<sup>7</sup> For purposes of enjoying the benefits of seniority under the contract, however, the starting seniority date is the date of hire in the Organizer position.

<sup>8</sup> There was testimony that one of the 20 was in the process of being hired into an Organizer position.

Houston Building Service, 296 NLRB 808 (1989). However, the record supports Petitioner's argument that, under either the date certain test or the reasonable expectation test, the OITs are not temporary employees under the Act.

**Date Certain Test.** OITs are not given a calendar date when their employment will end. OITs are told both that their job is temporary and tied to the campaign to which they are assigned, and also that their job is an on-the-job training experience, to develop organizing skills, of 12 to 15 months in duration. Thus, the calendar date for the end of a person's tenure as an OIT may be dictated by funding or campaign length, less than 12 months, or it may be dictated by the 12-month training period with a possible 3-month extension. It may also be dictated by the speed at which an OIT develops organizing skills and becomes a viable candidate for an Organizer position.

The date certain test may also be satisfied by the occurrence of a stated, sufficiently finite event, such as upon completion of a project. St. Thomas – St. John TV, 309 NLRB 712 (1992). OITs, however, are not always terminated upon completion of assignment to one campaign, particularly when the campaign ends in less than 12 months. OITs, who may continue working on a second campaign if funding is available, are distinguished from other "limited term" professionals hired by the Employer, i.e., contractors and consultants, whose term is tied definitively to one project. The Employer's witness Frank corroborated that termination of an OIT may be dictated by funding rather than campaign length.

**Reasonable Expectation Test.** Petitioner argues that, in addition to the fact that OITs are uncertain about the duration of their employment, OITs also have a reasonable expectation of continued employment. Gupta testified that he understood that, if he was successful in his work and developing skills through the various training offered him, there was a strong likelihood that he would be hired as an Organizer. His expectation was realized in October of 2001. The same expectation was realized by over twenty percent of the OIT pool hired between October, 2000 and April, 2000 who also became Organizers.

The Employer argues in its brief that the temporary nature of the OITs' employment is clear and unambiguous, and that Gupta's expectations of continued employment were nothing but assumptions without basis. The Employer states that prospect of an OIT's termination is so definite, communicated through conversations and the letter of employment, as to dispel any reasonable expectation of continued employment, citing St. Thomas – St. John TV, 309 NLRB at 713. The Employer suggests, without proof, that the temporary nature of the job was the reason the resignations of so many OITs were received – that the resignees were unhappy with what they knew was a temporary job, and they resigned to take a permanent position somewhere else.

The record does not support the Employer's assertions. The totality of the circumstances of an OITs position, and in particular, the elements of the position that define it as an on-the-job training position, creates a reasonable expectation, that, if an OIT learns what he or she needs to learn to become good organizers, and if sufficient funding and campaigns exist, the training will pay off in that he or she will continue to be employed at the next level – that of Organizer. Frank's testimony corroborated that the purpose of the training was specifically to create a labor pool of good organizers for the Employer. And, as previously noted, an OIT who is performing

well will be re-assigned to a second project if funding is available, notwithstanding that the OITs are told their employment is tied to a specific campaign. Frank testified that the name change made by the Employer, from Temporary Organizer to Organizer in Training, was reflection of the Employer's conscious intent to implement a more rigorous training program with the hopes of generating future permanent Organizers for its own staffing needs.

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in the parties' briefs, I find that OITs are not temporary employees.

## **ISSUE 2: WHETHER OITs SHARE A COMMUNITY OF INTEREST WITH UNIT EMPLOYEES**

The Union currently represents all salaried permanent professional employees, and in particular the Organizers, Journey Organizers, Lead Organizers, and Field Representatives who do organizing work in the field. The OITs are the only salaried organizers who are currently unrepresented.

All employees who perform organizing work are sent to campaigns of varying durations nationwide. Organizing work, performed by Organizers and Journey Organizers in the current bargaining unit as well as by OITs, includes the following tasks: conduct one-on-one organizing, build list of workers and explore worker interest, visit job sites to communicate with workers, visit workers in their homes, strategize, and inform Lead Organizer or Area Organizing Director of progress of organizing activity.<sup>9</sup> If an Organizer and an OIT are assigned to the same campaign, they report to the same supervising Area Organizing Director, and receive guidance from the same Lead Organizer if one is present. Organizers in the bargaining unit and OITs share common working conditions and common supervision. If both Organizers and OITs are assigned to a campaign, their office desks are in the same office space, and they share the responsibility of answering the phone. They each do their own data entry, and use the same forms for record keeping tasks. Gupta testified that when he became an Organizer, he had the same desk, supervisor, work site, and general responsibilities as when he had been an OIT.

The differences between OITs and Organizers are basically in experience and in the level of responsibility delegated to them. A requirement for the Organizer position is prior union organizing experience. A new Organizer goes through a probationary period of nine months as he or she gradually takes on more responsibilities, while an OIT does not have a probationary period, since the whole tenure of an OIT is as a trainee. The two other types of organizers the Employer has on staff are Journey Organizers and Lead Organizers. The differences between each of these classifications is also experience. Journey Organizers are basically in training to become Lead Organizers (or, stated otherwise, are LOITs – Lead Organizers in training). Organizers are paid a minimum of \$33,000 a year.<sup>10</sup> OITs receive approximately \$3,000 less a

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<sup>9</sup> Gupta testified that for the first three months of his OIT assignment, it was OITs alone that were doing all the campaign organizing work at that location for the Employer.

<sup>10</sup> October 30, 2001 job offer letter to Gupta stated a starting salary of \$32,979.

year in salary than newly hired Organizers and Field Representatives. OITs receive none of the benefits<sup>11</sup> the other employees receive except for single person health insurance coverage and time-off-with-pay between Christmas and New Year's, schedule permitting. All categories of Organizers report to Area Organizing Directors.

Kalamazoo Paper Box, 136 NLRB 134 (1962), stands for the proposition that the unit determination must relate to the factual situation in which collective bargaining takes place, in order to foster and not undermine an efficient and stable collective bargaining relationship. The collective bargaining contract between the parties here specifies agreements about a number of working conditions in the field, including, inter alia, travel expense reporting, auto allowances, work schedules while in the field, daily per diem rates, home visits, seniority-related policy concerning layoffs, discipline, and grievance mechanisms. Interest in these working conditions is shared among OITs and all those organizing in the field.

The Employer argues unconvincingly that there is no shared community of interest between OITs and unit employees. It bases its argument on the fact that the OITs receive some different benefits, lower wages, and allegedly different instruction and training from other employees. Gupta testified, however, that he was continuing in his job as Organizer to receive "on-the-job training," in the form of feedback and advice from a Lead Organizer and from his supervisor, as he had received when he was an OIT. The record reflects that the "different" training OITs received was a three-day training course and periodic classroom-type sessions on aspects of organizing, similar to the kinds of new employee training experiences that might be delivered in any profession or craft. The Board has considered lower wages, lack of benefits, and lack of seniority to be insufficient differences to exclude workers from the unit found appropriate, where, as here, the regular and temporary workers shared common working conditions, and the temporaries are considered for future employment. Outokumpo Copper Franklin, Inc., 334 NLRB No. 39 (June 6, 2001).

Based on the totality of factors described above, I find that a substantial community of interests exists between OITs and the other Organizers in the bargaining unit. I therefore find the following employees of the Employer to constitute an appropriate voting group:

All full-time and regular part-time Organizers in Training employed by the Employer from its Washington D.C. headquarters, but excluding office clerical employees, guards, and supervisors as defined by the Act.

If a majority of employees in the voting group cast valid ballots for the United Staff Union, they will be taken to have indicated their desire to be included in the existing bargaining unit of organizers and other salaried employees currently represented by the United Staff Union. If a majority of ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

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<sup>11</sup> Benefits include 13 Holidays, 15 days annual leave, 12 days annual sick leave, group health insurance, term life insurance, 401(k), and a tuition assistance program.



## **DIRECTION OF ELECTION**

An Election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the UNITED STAFF UNION.

## **LIST OF VOTERS**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **May 15, 2002**.

Dated May 1, 2002

at Baltimore, Maryland

/s/ WAYNE R. GOLD  
Regional Director, Region 5



460-5067-7050